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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. [redacted] 70

JAMES F. BOYLE, *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

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COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, James F. Boyle, by his attorney, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit (R. 42-43), entered in the above entitled cause, on the 27th day of February, 1951. The opinion of the Circuit Court of Appeals is unreported but may be found at Paragraph 72,281, Volume 4, 1951 Edition of Prentice-Hall Federal Tax Service, affirming the decision of the Tax Court of the United States, reported in 14 T. C. 1382.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Third Circuit was entered on February 27, 1951 (R. 35-43). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

On December 13, 1943 the petitioner sold to Air Cruisers, Inc. 3,302 shares of that corporation for $206,936.34. The cost of said stock to petitioner was $10,140. In filing his Federal income tax return for 1943 the petitioner reported the correct profit from the sale, $196,799.34, as capital gain from the sale of a capital asset (common stock in a corporation) and paid the tax thereon at capital gain rates.

The respondent concluded that the transaction involved was not a purchase and sale but rather the distribution of a taxable dividend under Section 115(g) of the Internal Revenue Code and taxed the petitioner on the entire sum of $206,936.34 as ordinary dividend income for 1943, determining a deficiency in tax of $137,561.21.

The Tax Court of the United States held that the 3,302 shares of stock had been "redeemed" by Air Cruisers, Inc. "at such time" and "in such manner" as to make the consideration of $206,936.34 paid for the stock by the corporation essentially equivalent to the distribution of a taxable dividend and affirmed the respondent in determining a deficiency of $137,561.21 in Federal income tax against the petitioner for the year 1943 (R. 14A-27A). The Court of Appeals affirmed the decision of the Tax Court (R. 35-43).

Accordingly this petition presents the following questions:

1. Whether the transaction involved constituted a sale by petitioner of 3,302 shares of stock in Air Cruisers, Inc. or the distribution of a taxable dividend by Air Cruisers, Inc. to petitioner in the amount of $206,936.34.

2. Whether the 3,302 shares of stock were "redeemed" by Air Cruisers, Inc. within the meaning of Section 115(g) of the Internal Revenue Code.

3. Whether there was a redemption of the stock by the corporation "at such time" and "in such manner" as to constitute the distribution of a taxable dividend under Section 115(g) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations involved in this case are presented in the Appendix, infra, pp. 22-24.

STATEMENT OF FACTS

The United States Court of Appeals for the Third Circuit summarized the facts as follows (R. 36-39):

> "Petitioner, an engineer, is the inventor of a number of inflatable rubber articles including rubber boats and life jackets. In 1929 he organized Air Cruisers, Inc., a Delaware corporation to manufacture and sell such products. That same year the Company's authorized capital stock was increased from 10,000 to 15,000 shares of no par value. Of these no more than 10,705 shares were ever issued and outstanding. The stock ownership on dates here material was as follows:

Stockholder	Prior to May 11, 1943	May 11, 1943 to Dec. 13, 1943	Dec. 13, 1943 to Dec. 18, 1943	Dec. 18, 1943 to May 16, 1944	May 16, 1944 to May 18, 1945	May 18, 1945 to May 29, 1945	After May 29, 1945
Petitioner	3,095	3,602	300	300	300	300	300
Glover	2,995	3,501	3,501	3,501	3,501	—	—
Tiffany	2,995	3,502	300	300	—	—	—
H. P. Morris	100	100	100	—	—	—	—
Pelham Bissell	710	—	—	—	—	—	—
Adrian Van Muffling	810	—	—	—	—	—	—
Treasury Stock	—	—	6,504	6,504	6,604	10,005	9,805
Vaughan	—	—	—	50	200	200	300
Harry A. Gerrish	—	—	—	50	200	200	300
Totals	10,705	10,705	10,705	10,705	10,705	10,705	10,705

Taxpayer, Glover and Tiffany as the chart shows, were the three chief stockholders. Taxpayer was the production head. Glover was the business manager and was president and treasurer. Tiffany was vice-president. He was active principally in signing notes for the company. On May 11, 1943, the three acquired Bissell and Muffling's 1,520 shares. Taxpayer and Tiffany received 507 each of these and Glover 506. Glover died July, 1943, and taxpayer became president. In December, 1943, Vaughan, who had succeeded Glover as treasurer, and Gerrish, attorney for and later executor of the Glover Estate, acquired the Morris 100 shares each receiving 50 shares. As of May 16, 1944, 150 of the 300 Tiffany shares optioned by Gerrish were acquired by Vaughan.

Tiffany had early quarreled with Glover on management and had been trying to sell his stock since 1941. He had disagreed with Vaughan after the latter succeeded Glover and had continued his efforts to sell. Some purchasers were interested only in taking over the company itself so his efforts to sell included negotiations which embraced disposal of the entire outstanding stock. Failing to sell, either individually or on a company basis, Tiffany and the taxpayer proposed a transfer of some of their stock to the company. Gerrish approved this. At a special meeting of the stockholders on December 13, 1943, presided over by Tiffany and attended only by him and petitioner, it was agreed that the company purchase 6,504 shares of their stock at its book value of $62.67 a

share. On that same date petitioner and Tiffany endorsed to the company 3,302 and 3,202 shares for which they received $206,936.34 and $200,669.34 respectively. The 6,504 shares were held by the company as treasury stock until its dissolution. Taxpayer retained 300 shares and continued as president because Gerrish, who expected to function as executor of Glover's Estate, believed his technical knowledge was required for the company to complete work under its contracts. Tiffany gave Gerrish a ten year option to purchase 300 shares at ten cents each with a proxy and power of attorney to vote the stock during the option period. The option was exercised in 1944. Tiffany considered the 300 shares compensation to Gerrish for services in disposing of his stock to the company. Gerrish said he thought they were a gratuity from Tiffany.

After Gerrish was confirmed as executor on March 30, 1944, he was unsuccessful in attempting to work out a plan of distributing the Glover stock to the legatees. On May 17, 1945, the stockholders' annual meeting authorized the purchase by the company of the 3,501 Glover shares at $62.67 per share. The legatees were given an option extending to June 1, 1945 to purchase from the company any portion of the stock so acquired up to the extent of their respective legacies for the sum of $62.67 per share. The Glover shares were transferred to the company as of May 18, 1945. Vaughan and Gerrish exercised their options as legatees and as of May 29, 1945, each acquired 100 shares from the company. The remaining 3,301 Glover shares were held by the company as treasury stock until its dissolution.

The company's products were important in the war effort. It dealt almost exclusively with the United States Government. Its gross sales rose from practically nothing in 1939 to $10,000,000 in 1942. As of December 31, 1943, after the transfer of the stock of taxpayer and Tiffany, the company's cash on hand and surplus were $476,294.05 and $222,711.56 respectively. The company never declared a cash or stock dividend. It was dissolved on November 7, 1949.

Petitioner reported the $206,936.34 received for his stock as a long term capital gain on his 1943 return which was filed in New Jersey. He used a basis of $10,140 being the amount paid for the 507 shares purchased from Bissell and Muffling, resulting in a gain of $196,796.34 and a 'gain * * * to be taken into account' of $98,398.17. The Commissioner determined that the $206,936.34 was to be taxed as a dividend i.e. as ordinary income instead of as a long term capital gain on the sale of assets. The Tax Court upheld this view."

The Court of Appeals affirmed the decision of the Tax Court of the United States.

SPECIFICATION OF ERRORS

The Honorable Circuit Court of Appeals erred:

1. In refusing to recognize that the transaction involved constituted a sale by petitioner of 3,302 shares of stock in Air Cruisers, Inc.

2. In holding and deciding that the 3,302 shares of stock were "redeemed" by Air Cruisers, Inc. within the meaning of Section 115(g) of the Internal Revenue Code.

3. In holding and deciding that there was a redemption of the stock by the corporation "at such time" and "in such manner" as to constitute the distribution of a taxable dividend under Section 115(g) of the Internal Revenue Code.

REASONS RELIED UPON FOR ALLOWANCE OF A WRIT OF CERTIORARI

We believe that:

1. The decision of the Court below is in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Fred B. Snite,* 177 F. (2d) 819 and the decision of the United States Court of Appeals for the Second Circuit in *Alpers* v. *Commissioner,* 126 F. (2d) 58.

Both the Tax Court and Circuit Court of Appeals found as a fact that the stock sold to Air Cruisers by petitioner was never "cancelled" or "retired" by the corporation but was held by the corporation in its treasury as "treasury" stock until its dissolution (R. 19A, 21A and 38.) Nevertheless, the Court below held that the stock had been "redeemed" within the meaning of Section 115(g) of the Internal Revenue Code.

In deciding a similar case involving Section 115(g) of the Code, the Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Snite* supra declared in an opinion rendered on November 15, 1949 (177 F. (2d) at page 823):

> "The Tax Court did not discuss the question of whether in fact redemption had been made. We seriously doubt whether redemption ever occurred. There was an express sale of the assets to the corporation. The stock was not cancelled and we think it was not redeemed. Redemption in this section, we believe, connotes something other than repurchase; it includes the idea of a surrender of shares by a stockholder and a retirement of that which he surrenders. Alpers v. Commissioner, 2 Cir. 126 F. 2d 58. These taxpayers did not surrender their stock but sold it. They did not contemplate retirement of their shares and the corporation did not retire them. Rather it placed them in its treasury, as live assets

> to be disposed of as it should thereafter determine. A true redemption of stock, preferred or common, occurs when it is called and retired. The stockholder, in such instance, receives the redemption money in discharge of his shares which are thereby thereafter without legal existence. On the other hand, when the corporation purchases its own capital stock it deals in the shares as it might have done in the stock of another corporation. Commissioner v. Rollins Burdick Hunter Co., 74 F. 2d 698, 7th Cir."

In *Alpers* v. *Commissioner,* supra, relied on by the Court in *Commissioner of Internal Revenue* v. *Snite, supra,* the Court of Appeals for the Second Circuit said in the concluding paragraph of its opinion (126 F. (2d) at page 61):

> "* * * We do not think that a subsequently formed intention to retire stock purchased by a corporation can convert its payment of the purchase price into 'a distribution by the corporation in complete cancellation or redemption of a part of its stock' so as to affect the tax liability of the shareholder who sold, even on the assumption that formal compliance with the state law as to retirement is unnecessary."

We think, therefore, that there is a clear conflict between the decision of the Court below in the case at bar and the decisions of the Seventh and Second Circuits in *Commissioner of Internal Revenue* v. *Snite, supra,* and *Alpers* v. *Commissioner, supra.*

2. By the sale of petitioner's 3,302 shares of stock and Tiffany's 3,202 shares of stock to the corporation the control of the corporation was completely changed. By these sales the holding of each of the two selling stockholders was lessened in amount and the proportionate holding of the other stockholders increased.

As shown above, on December 1, 1943, the stockholdings of Air Cruisers, Inc. were as follows:

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	3,602 shares
Carter Tiffany	3,502 shares
H. P. Morris	100 shares

Immediately after the sales by Boyle and Tiffany on December 13, 1943, the stockholdings of Air Cruisers, Inc. were as follows (R. 16A):

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	300 shares
Carter Tiffany (holding of record)	300 shares
H. Preston Morris	100 shares

Boyle's stockholdings had lessened by 3,302 shares and Tiffany's by 3,202 shares, whereas the proportionate holdings of the other stockholders were greatly increased. In fact, Tiffany lost all semblance of control because the 300 shares which he held as of record had been optioned to Gerrish and Gerrish had been granted a complete power of attorney to vote these 300 shares of stock. After December 13, 1943, Tiffany had nothing further to do with the corporation and passed completely out of the picture.

However, the Court below held that there was a sufficient pro rata distribution among the stockholders of the corporation "at such time" and "in such manner" as to constitute the distribution of a taxable dividend under Section 115(g) of the Internal Revenue Code rather than a sale.

On this point we think there is again a clear conflict between the decision of the Court below and the decision of the Seventh Circuit Court of Appeals in *Commissioner of Internal Revenue* v. *Snite*. In the *Snite* case the Court of Appeals said:

> "Obviously, the sale of stock to the company was the same as the sale of a piece of real estate to it and the same as the purchase from stockholders of stock in another corporation. It was, in its essence, a sale of an asset for a stated valuable considera-

tion, resulting in a profit, for which the taxpayers duly accounted. (177 F. (2d) page 822)

* * * *

"There was no pro rata distribution to stockholders but the payment of purchase price to two out of four stockholders, all of whom held substantial interests in the corporation. By virtue of the transaction, the holding of each of the two selling stockholders was lessened in amount and the proportionate holding of the other stockholders increased." (177 F. (2d) page 822)

3. The questions at issue involve important principles of tax law as follows:

a. The meaning of the term "redemption" under Section 115(g) of the Internal Revenue Code.

b. Whether a substantial pro rata distribution among stockholders within a given year is necessary in determining that a sale of corporate stock to a corporation is made "at such time" and "in such manner" as to be essentially equivalent to a taxable dividend under Section 115(g) of the Internal Revenue Code.

It is respectfully submitted that the decision of the Court below is incorrect and that the conflict between the decisions of the United States Courts of Appeal on the questions involved should be set at rest and the points finally decided by this Honorable Court.

Counsel for petitioner certifies that in his opinion this petition is well founded and is not interposed for delay.

Wherefore, it is respectfully prayed that this petition be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1950

No. .....

James F. Boyle, *Petitioner*,

v.

Commissioner of Internal Revenue, *Respondent*.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Tax Court of the United States (R. 14A-27A) is reported in 14 T. C. 1382. The opinion of the United States Court of Appeals for the Third Circuit is as yet unreported but may be found at Paragraph 72,281, Volume 4, 1951 Edition of Prentice-Hall Federal Tax Service.

Questions Presented, Statutes Involved, Etc.

A statement of the questions presented, statutes involved, jurisdiction, specification of errors to be urged and a statement of the facts of the case will be found in the foregoing petition.

ARGUMENT

I.

The Stock Sold by the Petitioner to Air Cruisers, Inc. Was Neither "Cancelled" Nor "Redeemed" Within the Meaning of Section 115(g) of the Internal Revenue Code. The Court of Appeals Erred in Holding That the Stock Was "Redeemed" and That Section 115(g) of the Code Was Applicable in This Case.

In order for Section 115(g), relied upon by the Court below, to become applicable in any given case the corporate stock involved must be "cancelled" or "redeemed" for the statute says: "* * * If a corporation cancels or redeems its stock * * *."

The findings of the Tax Court confirm the proposition that as a matter of fact the stock here involved was never "'cancelled" or "redeemed" by the corporation but was held by the corporation in its treasury as "treasury" stock.

The Tax Court found (R. p. 19A):

> "On December 13, 1943, petitioner and Tiffany endorsed to the company 3,302 and 3,202 shares, for which they received $206,936.34 and $200,669.34, respectively. *The 6,504 shares were held by the company as treasury stock until its dissolution.*" (Italics ours.)

The Tax Court further found (R. p. 21A):

> "As of May 18, 1945, the Glover Estate transferred its 3,501 shares to the company in exchange for $62.67 per share which it reported in its Federal income tax return as capital gain.
>
> "Vaughan and Gerrish exercised their options as legateees, and as of May 29, 1945, each acquired 100 shares from the company. The remaining 3,301 Glover shares were held by the company as treasury stock until its dissolution. None of the shares

formerly owned by petitioner, Tiffany, or Glover were ever formally canceled.

"Revenue stamps, provided for under the Stamp Tax Act, were affixed to each of the shares transferred to the company by petitioner and Tiffany on December 13, 1943, and by Glover's Estate on May 18, 1945."

Nevertheless the Court below held in its opinion that as a matter of law the stock was "redeemed" within the meaning of Section 115(g) of the statute.

We think that the Court's conclusion is in conflict with the most recent legal authority and the interpretation which has been placed upon Section 115(g) by the Circuit Courts of Appeal. In *Commissioner of Internal Revenue* v. *Fred B. Snite,* 177 F. (2d) 819, 38 AFTR 841, the United States Court of Appeals for the Seventh Circuit in its opinion entered on November 15, 1949 said (177 F. (2d) at page 823):

"The Tax Court did not discuss the question of whether in fact redemption had been made. We seriously doubt whether redemption ever occurred. There was an express sale of the assets to the corporation. The stock was not cancelled and we think it was not redeemed. Redemption in this section, we believe, connotes something other than repurchase; it includes the idea of a surrender of shares by a stockholder and a retirement of that which he surrenders. Alpers v. Commissioner, 2 Cir. 126 F. 2d 58. These taxpayers did not surrender their stock but sold it. They did not contemplate retirement of their shares and the corporation did not retire them. Rather it placed them in its treasury, as live assets to be disposed of as it should thereafter determine. A true redemption of stock, preferred or common, occurs when it is called and retired. The stockholder, in such instance, receives the redemption money in discharge of his shares which are thereby thereafter without legal existence. On the other hand, when the corporation purchases its own capital stock it deals in the shares as it might have done in the

stock of another corporation. Commissioner v. Rollins Burdick Hunter Co., 74 F. 2d 698, 7th Cir.

As authority for its decision in the *Snite* case, the Court of Appeals for the Seventh Circuit cited *Alpers* v. *Commissioner*, 126 F. (2d) 58 (CCA-2). In that case the United States Court of Appeals stated, in the concluding paragraph of its opinion, as follows (126 F. (2d) at page 61):

> • • • We do not think that a subsequently formed intention to retire stock purchased by a corporation can convert its payment of the purchase price into "a distribution by the corporation in complete cancellation or redemption of a part of its stock" so as to affect the tax liability of the shareholder who sold, even on the assumption that formal compliance with the state law as to retirement is unnecessary.

Order reversed.

In support of its decision that the stock involved in this case was redeemed within the meaning of Section 115 (g), although held as treasury stock and never canceled or retired, the Court below cited *Kirschenbaum* v. *Commissioner* (CCA-2) 155 F. (2d) 23. The *Kirschenbaum* case first came before the Tax Court as the *Appeal of Harry Banner, Tax Court Memorandum Decision, March 27, 1945, Docket Nos. 3655, 3656, 4 T. C. M. 342.*

The case of Harry Banner, *supra*, was appealed by the taxpayer to the United States Court of Appeals for the Second Circuit and affirmed by that Court in *Kirschenbaum* v. *Commissioner*, 155 F. (2d) 23. (The name of the case on appeal was changed from Banner to Kirschenbaum.) The Court of Appeals for the Second Circuit affirmed the Tax Court in *Kirschenbaum* v. *Commissioner, supra*, on the basis of the rule established by *Dobson* v. *Commissioner*, 320 U. S. 489. The Court stated in its opinion, however, that in a case on appeal from a District Court, it would hold that stock purchased and placed in

the corporate treasury, subject to resale, is never "cancelled or redeemed". (155 F. (2d) at page 25), citing *Alpers* v. *Commissioner*, 126 F. (2d) 58, CCA-2, February 21, 1942.

Since the Dobson rule has been repealed by legislative enactment, we think that the *Kirschenbaum* case is a clear precedent for the petitioner herein and is authority for the petitioner's position in addition to the *Alpers* and *Snite* cases.

Counsel for petitioner understands that the respondent herein has acquiesced in the decision of the Court of Appeals for the Seventh Circuit in the *Snite* case and that no petition for certiorari was filed by the Commissioner.

We respectfully submit that the decision of the United States Court of Appeals in the case at bar is in direct conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Fred B. Snite, supra,* and the decision of the United States Court of Appeals for the Second Circuit in *Alpers* v. *Commissioner, supra.*

II.

The Legislative History of Section 115(g) Supports the Position of the Petitioner in This Case and the Decisions of the Seventh and Second Circuits Respectively in Commissioner of Internal Revenue v. Fred B. Snite, Supra and Alpers v. Commissioner, Supra.

The origin of section 115(g) as it now appears in the Internal Revenue Code was in section 201(d) of the Revenue Act of 1921. In that Act the provision that a cancellation or redemption equivalent to a taxable dividend should be taxed as a dividend was coupled with the provision that a stock dividend is not subject to tax and the dividend tax applied only if the cancellation or redemp-

tion of stock was preceded by the distribution of a stock dividend. The provision appeared in the Revenue Act of 1924 as section 201(f) amended to provide for its application where the cancellation or redemption occurred either *before or after* the distribution of a stock dividend. In the Revenue Act of 1926, the section was further amended to apply "whether or not such stock was issued as a stock dividend." Aside from provisions as to the date of application of the amendment made by the 1926 Act, the section there appearing as section 201(g) was then in substantially its present form.

In commenting on the provision as it appeared in the 1921 Revenue Bill, Senator McCumber, the Floor Manager for the Bill in the Senate stated as follows:

> "• • • Mr. President, nothing has developed at the present time to necessitate this proposed amendment, but conditions are ripening, I think, among a number of corporations for them to declare stock dividends which, under the late decision of the Supreme Court, would not be taxable, and then, we will say in a month or a short time thereafter, *to redeem the stock, in other words, cancel the stock.* In that way, under the law as it now stands, and under the Supreme Court decisions, a stockholder would not be compelled to pay a tax upon the income so derived. • • •" (Emphasis added.) (Cong. Rec. Vol. 61, p. 7507.)

It is noted that Senator McCumber used the words "cancel" and "redeem" as synonymous.

The Conference Report on the Revenue Act of 1926 (H. Rept. 356, 69th Cong. 1st Sess.), explaining the amendment removing the necessity for the issuance of a stock dividend as a condition precedent to application of section 201(g) of the Revenue Act of 1926 contained the following example:

> "• • • assume that two men hold practically all the stock of a corporation for which each paid $50,000

in cash, and the corporation had accumulated a surplus of $50,000 above its cash capital. It is claimed that under existing law the corporation could buy from the stockholders for cash one-half of the stock held by them *and cancel it* without making the stockholders subject to any tax, yet this action in all essentials would be the equivalent of a distribution from cash dividends of the earned surplus." (Emphasis added.) Report Conference Committee, 69th Cong. 1st Sess., H. Rept. 356 (p. 30).

The same example in the same language appeared in the reports of the Ways and Means Committee and the Senate Finance Committee on the Revenue Act of 1926 (H. Rept. 1, 69th Cong., 1st Sess., page 5. S. Rept. 52, 69th Cong. 1st Sess., page 15). It is to be noted that in this example the stock was reacquired from the stockholders on a pro rata basis and the corporation then proceeded to "cancel it."

At the same time that Congress was considering section 201(f) of the Revenue Act of 1924 which corresponds to section 115(g) of the Internal Revenue Code, it was considering sections 201(c) and 201(g) of the 1924 Act which provided for the treatment of distributions in partial liquidation and defined the term "amounts distributed in partial liquidation." The definition of "partial liquidation" in section 201(g) is a "distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock." The same words "cancellation" and "redemption" are used in section 201(g) of the 1924 Act as appear in section 201(f) of that Act, which is the predecessor of the sections of the Code in question in this case. In explaining these provisions, the Committee reports used the word "retirement" in speaking of what is called a "cancellation or redemption" in the Act. (H. Rept. No. 179, 68th Cong. 1st Sess. pp. 11-12). See *W. C.*

Robinson, 42 B. T. A. 725 (Sept. 25, 1940), acq. 1941-1 C. B. 9.

It is respectfully submitted that the legislative history of Section 115(g) demonstrates that the word "redeemed" as used in this section of the statute means to "retire".

> "• • • Treasury stock is an asset in the company's treasury and may be resold at any time as suits the corporate owner's purpose, while retired stock ceases to exist as an evidence of interest or ownership in corporate property."

Amelia H. Cohen Trust et al. v. *Commissioner*, 121 F. (2d) 689; *Borg et al.* v. *International Silver Co.* (CCA 2) 11 F. (2d) 147, 150.

III.

In This Case There Was No Distribution to the Stockholders of Air Cruisers, Inc. "At Such Time" or "In Such Manner" As to Be "Essentially" Equivalent to a Taxable Dividend Within the Meaning of Section 115(g).

We think that the decision of the Court below and the position of respondent reads out of Section 115(g) the important phrases necessary for that section of the statute to be applicable, to wit: a "distribution" at "such time" and "in such manner" as to be "essentially equivalent to a taxable dividend.

We believe that there must be present to meet the qualifications of "distribution" "at such time" and "in such manner" the following:

(a) A substantially pro rata distribution among the stockholders within a given year.

(b) A distribution within a given time which does not substantially change the control among the corporate stockholders.

We respectfully urge that this view is sustained by the latest decision upon the very issue by the United States Court of Appeals for the Seventh Circuit in *Commissioner* v. *Snite*, supra. There the Court said (177 F. (2d) at page 822):

• • • •

"Obviously, the sale of stock to the company was the same as the sale of a piece of real estate to it and the same as the purchase from stockholders of stock in another corporation. It was, in its essence, a sale of an asset for a stated valuable consideration, resulting in a profit, for which the taxpayers duly accounted."

• • • •

"There was no pro rata distribution to stockholders but the payment of purchase price to two out of four stockholders, all of whom held substantial interests in the corporation. By virtue of the transaction, the holding of each of the two selling stockholders was lessened in amount and the proportionate holding of the other stockholders increased."

• • • •

Here there was no "distribution" but a sale of stock by only two stockholders. The sale of the asset (stock), resulting in a profit was accounted for in the petitioner's return. However, the Court of Appeals refused to recognize the sale.

As of December 1, 1943, the stockholders in Air Cruisers, Inc. were as follows (Appendix p. 16A):

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	3,602 shares
Carter Tiffany	3,502 shares
H. P. Morris	100 shares
Total	10,705 shares

On December 18, 1943, Harry Gerrish and Thomas P. Vaughan acquired the stock owned by H. P. Morris (50 shares each).

During the year 1943, Air Cruisers, Inc. paid no monies in connection with their stockholdings to the Estate of Glover, owning 3,501 shares, or to the minority stockholders owning 100 shares, Morris, Gerrish and Vanghan.

One of the vital characteristics of a "distribution" at such time and in such manner as to be essentially equivalent to a dividend is a payment pro rata to all stockholders owning stock of the same class. It cannot be said that there is in any true sense a distribution of a dividend when no payment is made to a stockholder owning approximately one-third of a corporation's outstanding stock as was the case here with respect to the Glover Estate owning 3,501 shares of common stock out of 10,705. Here there was no pro rata cancellation or redemption of a portion of the corporation's stock *"pro rata"* among all the shareholders as referred to in respondent's Regulations 111, Section 29.11509.

By the sale of petitioner's 3,302 shares of stock and Tiffany's 3,202 shares of stock to the corporation, the control of the corporation was completely changed. By these sales the holding of each of the two selling stockholders was lessened in amount and the proportionate holding of the other stockholders increased.

As shown above, on December 1, 1943, the stockholdings of Air Cruisers, Inc. were as follows:

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	3,602 shares
Carter Tiffany	3,502 shares
H. P. Morris	100 shares

Immediately after the sales by Boyle and Tiffany on December 13, 1943, the stockholdings of Air Cruisers, Inc. were as follows (R. p. 16A):

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	300 shares
Carter Tiffany (holding of record)	300 shares
H. Preston Morris	100 shares

Boyle's stockholdings had lessened by 3,302 shares and Tiffany's by 3,202 shares, whereas the proportionate holdings of the other stockholders were greatly increased. In fact, Tiffany lost all semblance of control because the 300 shares which he held as of record had been optioned to Gerrish and Gerrish had been granted a complete power of attorney to vote these 300 shares of stock. After December 13, 1943, Tiffany had nothing further to do with the corporation and passed completely out of the picture.

We believe the decision of the United States Court of Appeals for the Third Circuit in the case at bar is again in conflict with the decision of the United States Court of Appeals for the Seventh Circuit in *Commissioner of Internal Revenue* v. *Snite*, supra, as to the issues of pro rata distribution and control.

CONCLUSION

It is respectfully submitted that the decision of the Circuit Court of Appeals is incorrect and that for the reasons stated herein the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX #1

STATUTES AND REGULATIONS INVOLVED

The statute and regulations of the Commissioner of Internal Revenue involved are as follows:

Internal Revenue Code

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(g) REDEMPTION OF STOCK:—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

Regulations 111

Reg. 111, Sec. 29.22(a)-15. Acquisition or disposition by a corporation of its own capital stock.—Whether the acquisition or disposition by a corporation of shares of its own capital stock gives rise to taxable gain or deductible loss depends upon the real nature of the transaction, which is to be ascertained from all its facts and circumstances. The receipt by a corporation of the subscription price of shares of its capital stock upon their original issuance gives rise to neither taxable gain, nor deductible loss, whether the subscription or issue price be in excess of, or less than, the par or stated value of such stock.

But if a corporation deals in its own shares as it might in the shares of another corporation, the resulting gain or loss is to be computed in the same manner as though the corporation were dealing in the shares of another. So also if the corporation receives its own stock as consideration upon the sale

of property by it, or in satisfaction of indebtedness to it, the gain or loss resulting is to be computed in the same manner as though the payment had been made in any other property. Any gain derived from such transactions is subject to tax, and any loss sustained is allowable as a deduction where permitted by the provisions of the Internal Revenue Code.

Reg. 111, Sec. 29.115-9. Distribution in redemption or cancellation of stock taxable as a dividend.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. If a distribution is made pursuant to a corporate resolution reciting that the distribution is made in liquidation of the corporation, and the corporation is com-

pletely liquidated and dissolved within one year after the distribution, the distribution will not be considered essentially equivalent to the distribution of a taxable dividend; in all other cases the facts and circumstances should be reported to the Commissioner for his determination whether the distribution, or any part thereof, is essentially equivalent to the distribution of a taxable dividend.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 70

JAMES F. BOYLE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 35–42) is reported at 187 F. 2d 557. The findings of fact and opinion of the Tax Court of the United States (R. 14A–27A) are reported at 14 T. C. 1382.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1951. (R. 42–43.) The petition for a writ of certiorari was filed on May 24, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254.

QUESTIONS PRESENTED

1. Whether the court below properly sustained the Tax Court's conclusion that the payment of $206,936 to taxpayer by Air Cruisers, Inc., for 3,302 shares of his stock in that company occurred at such time and in such manner as to be essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115 (g) of the Internal Revenue Code.

2. Whether the purchase by the company of taxpayer's stock was a "redemption" within the meaning of Code Section 115 (g) where the company held the stock as treasury shares until dissolution.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * * *

(g) *Redemption of Stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(26 U. S. C. 1946 ed., Sec. 115.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

> SEC. 29.115–9. *Distribution in Redemption or Cancellation of Stock Taxable as a Dividend.*—
>
> * * * * *
>
> The question whether a distribution in connection with a cancellation or redemption of stock is essentially equivalent to the distribution of a taxable dividend depends upon the circumstances of each case. A cancellation or redemption by a corporation of a portion of its stock pro rata among all the shareholders will generally be considered as effecting a distribution essentially equivalent to a dividend distribution to the extent of the earnings and profits accumulated after February 28, 1913. On the other hand, a cancellation or redemption by a corporation of all of the stock of a particular shareholder, so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend. A bona fide distribution in complete cancellation or redemption of all of the stock of a corporation, or one of a series of bona fide distributions in complete cancellation or redemption of all of the stock of a corporation, is not essentially equivalent to the distribution of a taxable dividend. If a distribution is made pursuant to a corporate resolution reciting that the distribution is made in liquidation of the corpora-

tion, and the corporation is completely liquidated and dissolved within one year after the distribution, the distribution will not be considered essentially equivalent to the distribution of a taxable dividend; in all other cases the facts and circumstances should be reported to the Commissioner for his determination whether the distribution, or any part thereof, is essentially equivalent to the distribution of a taxable dividend.

STATEMENT

The facts found by the Tax Court (R. 15A–22A) may be summarized as follows:

Taxpayer, an engineer, invented a number of inflatable rubber products. In 1929 he organized Air Cruisers, Inc., to manufacture and sell such products. (R. 15A–16A.)

Taxpayer, Earl F. Glover, and Carter Tiffany were the three principal stockholders until Glover's death in July 1943. In December of that year, Thomas P. Vaughan, who had succeeded Glover as treasurer, and Harry A. Gerrish, attorney for, and later executor of, the Glover estate, acquired 100 shares held by H. P. Morris, each receiving 50. (R. 16A–17A, 20A.)

Early in the history of the company, Tiffany had disagreed with Glover on management and had been trying to sell his stock since 1941. He disagreed with Vaughan after the latter succeeded Glover and had continued his efforts to sell.

Having failed to sell either his individual stock or complete ownership of the company through agreement with other stockholders, Tiffany and the taxpayer proposed a transfer of some of their stock to the company, which was approved by Gerrish. On December 13, 1943, at a stockholders' meeting attended only by taxpayer and Tiffany, it was agreed that the company purchase 6,504 shares of their stock at $62.67 a share, the book value. Also on that date taxpayer and Tiffany endorsed to the company 3,302 and 3,202 shares for which they received the book value of $206,936.34 and $200,669.34, respectively. The 6,504 shares were held by the company as treasury stock until its dissolution. (R. 16A–19A.)

Taxpayer retained his remaining 300 shares and continued as president because Gerrish, who expected to function as executor of Glover's estate, believed taxpayer's technical knowledge was required for the company to complete work under its contracts. Tiffany gave Gerrish a ten-year option to purchase his remaining 300 shares at ten cents each, with a power of attorney to vote the stock during the option period. The option was exercised in 1944. (R. 19A.)

After Gerrish was confirmed as executor on March 30, 1944, he was unsuccessful in attempting to work out a plan of distributing the Glover stock to the legatees. At their annual meeting held on May 17, 1945, the stockholders of Air Cruisers, Inc., authorized the purchase by the

company of the 3,501 Glover shares at $62.67 a share. The legatees were given options to purchase from the company any of the stock so acquired at the company's purchase price of $62.67. All of the Glover shares were transferred to the company as of May 18, 1945, and on May 29 of that year Vaughan and Gerrish, two of the legatees, exercised their options, each acquiring 100 shares from the company. The remaining 3,301 shares were held by the company as treasury stock until its dissolution. (R. 20A–21A.)

As a result of the various stock transfers referred to above, the approximately one-third ownership of stock by taxpayer on May 11, 1943, represented by 3,602 shares, was on May 29, 1945, still a one-third interest, although represented by only 300 shares. The identity of the other two stockholders with one-third interests had changed and there were by that date 9,805 shares in the treasury which were never reissued. (R. 16A.)[1]

[1] The ownership of stock at all times relevant to this controversy was as follows (R. 16A):

Stockholder	Prior to May 11, 1943	May 11, 1943 to Dec. 13, 1943	Dec. 13, 1943 to Dec. 18, 1943	Dec. 18, 1943 to May 16, 1944	May 16, 1944 to May 18, 1945	May 18, 1945 to May 29, 1945	After May 29, 1945
Petitioner	3,095	3,602	300	300	300	300	300
Glover	2,995	3,501	3,501	3,501	3,501	------	------
Tiffany	2,995	3,502	300	300	------	------	------
H. P. Morris	100	100	100	------	------	------	------
Pelham Bissell	710	------	------	------	------	------	------
Adrian Van Muffling	810	------	------	------	------	------	------
Treasury Stock	------	------	6,504	6,504	6,604	10,005	9,805
Vaughan	------	------	------	50	200	200	300
Harry A. Gerrish	------	------	------	50	200	200	300
Totals	10,705	10,705	10,705	10,705	10,705	10,705	10,705

The company's gross sales rose from practically nothing in 1939 to ten million dollars in 1942 (R. 16A). On December 31, 1943, after the transfer of the stock of taxpayer and Tiffany, the company's cash on hand was $476,294.05 and its surplus was $221,711.56 (R. 21A). The company never declared a cash or stock dividend (R. 16A). It was dissolved on November 7, 1949 (R. 22A).

Taxpayer reported the amount received for his stock as a long-term capital gain on his 1943 return. The Commissioner determined that the entire amount received was to be taxed as a dividend and, therefore, as ordinary income. The Tax Court, in approving the deficiency, found as an ultimate fact that the shares in question "were redeemed by the company at such time and in such manner as to make the distribution of the $206,936.34 essentially equivalent to the distribution of a taxable dividend." (R. 22A.) The Court of Appeals affirmed. (R. 42.)

ARGUMENT

1. It has been uniformly held that the standard prescribed by Section 115 (g) of the Internal Revenue Code, *supra,* p. 2, for determining whether the purchase by a corporation of its stock is to be treated as a dividend—i. e., whether the purchase occurred "at such time and in such manner as to make the distribution * * * essentially equivalent to the distribution of a taxable dividend," requires a factual determination

which turns on all the circumstances of the particular case involved. *Flanagan* v. *Helvering,* 116 F. 2d 937 (C. A. D. C.); *Commissioner* v. *Snite,* 177 F. 2d 819 (C. A. 7); *Meyer* v. *Commissioner,* 154 F. 2d 55 (C. A. 3); *Rheinstrom* v. *Conner,* 125 F. 2d 790 (C. A. 6); *McGuire* v. *Commissioner,* 84 F. 2d 431, 433 (C. A. 7); *Randolph* v. *Commissioner,* 75 F. 2d 472 (C. A. 8). Cf. *Commissioner* v. *Estate of Bedford,* 325 U. S. 283; *Bazley* v. *Commissioner,* 331 U. S. 737. See also Treasury Regulations 111, Section 29.115–9, *supra,* pp. 3–4.

The Tax Court's ultimate finding of fact (R. 22A) was that the redemption occurred "at such time and in such manner as to make the distribution of the $206,936.34 essentially equivalent to the distribution of a taxable dividend." This conclusion, expressly approved by the Court of Appeals (R. 39, 40–41), is unquestionably supported by the record in this case because most, if not all, of the factors which in other cases have been held relevant in determining whether the stock purchase was a dividend, are present. Thus the stock of the company was closely held (R. 16A–22A);[2] there were large earnings and

[2] H. Rep. No. 1, 69th Cong., 1st sess., p. 5 (1939–1 Cum. Bull. (Part 2) 315); S. Rep. No. 52, 69th Cong., 1st sess., p. 15 (1939–1 Cum. Bull. (Part 2) 332); H. Conference Rep. No. 356, 69th Cong., 1st sess., p. 30 (1939–1 Cum. Bull. (Part 2) 361); *Flanagan* v. *Helvering,* 116 F. 2d 937 (C. A. D. C.); *Bazley* v. *Commissioner,* 155 F. 2d 237, 239 (C. A. 3), affirmed, 331 U. S. 737.

unnecessary accumulation of cash (R. 23A);[3] no cash dividends had ever been declared (R. 16A);[4] the company did not then intend to liquidate or to contract its business (R. 24A);[5] the purchase of taxpayer's stock served no business purpose of the company nor was one even suggested (R. 23A); it was motivated by considerations personal to individual stockholders (R. 24A);[6] and finally, the net effect of the purchase of taxpayer's stock was to distribute earnings of the company just as if a cash dividend had been declared (R. 22A, 26A).[7] The decision below,

[3] See fn. 2 above; see also *Hirsch* v. *Commissioner*, 124 F. 2d 24, 29 (C. A. 9).

[4] In this respect, the facts of this case more clearly indicate a dividend than those in most of the cases to come before the courts since even an intermittent dividend policy or relatively low cash dividend rate has given rise to the inference that the redemption of stock was a substitute for cash dividends. *Flanagan* v. *Helvering*, *supra*, p. 939, and cases cited in fn. 5 of that opinion. *Brown* v. *Commissioner*, 79 F. 2d 73 (C. A. 3).

[5] *Smith* v. *United States*, 121 F. 2d 692 (C. A. 3); *Rheinstrom* v. *Conner*, 125 F. 2d 790, 793 (C. A. 6); *Flanagan* v. *Helvering*, *supra*, p. 939; *McGuire* v. *Commissioner*, 84 F. 2d 431, 432 (C. A. 7); *Commissioner* v. *Straub*, 76 F. 2d 388 (C. A. 3).

[6] "The personal requirements and desires of its sole stockholder, and not the liquidation of the company, were the motivating cause of the stock redemption." *Smith* v. *United States*, *supra*, p. 695. *Bazley* v. *Commissioner*, *supra*, pp. 241, 244; cf. *Commissioner* v. *Snite*, 177 F. 2d 819 (C. A. 7).

[7] *Bazley* v. *Commissioner*, 331 U. S. 737; *Kirschenbaum* v. *Commissioner*, 155 F. 2d 23 (C. A. 2), certiorari denied, 329 U. S. 726; cf. *Commissioner* v. *Estate of Bedford*, 325 U. S. 283. See also *Smith* v. *United States*, *supra*; *Hirsch* v. *Com-*

then, is manifestly correct, but even if there might be some doubt as to this, no occasion would be presented for the issuance of the writ because the factual determination on which the case turns and on which both courts below have agreed, will not, on familiar principles, be reviewed by this Court. See *Goodyear Co.* v. *Ray-O-Vac Co.*, 321 U. S. 275, 278; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 542; *Baumgartner* v. *United States*, 322 U. S. 665.

2. Petitioner contends (Pet. 8–10, 20–21) that by the sale of his 3,302 shares of stock and Tiffany's 3,202 shares "the control of the corporation was completely changed." He asserts that these sales lessened his and Tiffany's holdings and thereby increased proportionately the holdings of the other stockholders. He thus endeavors to show a conflict between the decision in the instant case and that of the Seventh Circuit in *Commissioner* v. *Snite*, 177 F. 2d 819. Apart from the fact that change of control of the corporation was only one of the numerous factors which entered into the ultimate determination of the question presented in this case, the short answer to petitioner's contention is that there is no factual foundation in the record to support his assertion that there was a substantial change of control.

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missioner, supra; Flanagan v. *Helvering, supra; Hyman* v. *Helvering*, 71 F. 2d 342 (C. A. D. C.), certiorari denied, 293 U. S. 570.

Obviously, petitioner's contention that there was a complete change of corporation control immediately after the sale of his and Tiffany's shares rests entirely on the fact that the corporation did not purchase the Glover estate's shares until a later date (Pet. 9, 20). But, as the Court of Appeals observed, immediately after the sales of their shares petitioner and Tiffany were practically the only stockholders of the corporation with power to act, since the Glover estate was in litigation and its shares were "tied up." (R. 40.) Thus the sale of the Glover estate shares was delayed for technical reasons only (R. 26A). And, as both courts below concluded, the later sale to the corporation of the Glover estate shares was made pursuant to a prearranged plan or agreement. (R. 26A, 40.) The Court of Appeals accurately pointed out (R. 40) that "Eventually * * * petitioner actually possessed one-third of the company's outstanding stock as he had originally," and then quoted with approval the conclusion of the Tax Court that (see R. 26A and 40):

> Although it took something over a year to accomplish, the upshot was, as our findings show, that a corporation, with three principal stockholders holding their shares in virtually equal proportions, distributed to them the bulk of its accumulated earnings and that ultimately there remained three shareholders again with identical holdings.

It is plain, therefore, that there is no factual basis in the record for petitioner's assertion that there was a complete change in the control of the corporation immediately after the sales of his and Tiffany's shares of stock. Consequently, the Court of Appeals did not, in the instant case, reach the question whether an effective change in the control of the corporation would have required a contrary conclusion. Hence, its decision did not and could not create a conflict with the decision in the *Snite* case on the change-of-control question.

3. The only other reason advanced by petitioner for the issuance of a writ of certiorari (Pet. 7–8) is that because the shares sold to the corporation were placed in its treasury there was no "redemption" of the stock as required by Section 115 (g), *supra,* p. 2. He contends that the contrary conclusion reached by the Court of Appeals in the instant case is in conflict with the Seventh Circuit's decision in *Commissioner* v. *Snite, supra,* and the Second Circuit's decision in *Alpers* v. *Commissioner,* 126 F. 2d 58.

There is no merit either in the interpretation of the statute contended for by petitioner or in his claim of conflict. It has long been held that under Section 115 (g), *supra,* p. 2, the purchase of stock which is placed in the treasury of a company where there are no plans to reissue

is a "redemption."[8] The basis of the established rule was succinctly stated by the Court of Appeals in the instant case in its approved quotation from the Fourth Circuit's opinion in *Wall* v. *United States,* 164 F. 2d 462, 465, as follows (R. 41):

> If it should be held that taxpayers can avoid the terms of the statute by the simple device of selling their stock to the corporation and having it held as treasury stock, the purpose of the statute to prevent the evasion of taxes upon corporate dividends would be completely frustrated.

The decision in the *Alpers* case in no way conflicts with the decision below because a different statute (Section 115 (c), Internal Revenue Code; 26 U. S. C. 115 (c)) with different language and purposes was there involved. The language in the *Snite* case on which petitioner relies is an obiter dictum as the court below observed (R. 42), and in any event, that case is plainly distinguishable because the very purpose of the stock purchase in that case was to make those shares available for resale to key employees,

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[8] *Wall* v. *United States*, 164 F. 2d 462, 465 (C. A. 4); *Kirschenbaum* v. *Commissioner*, decided March 27, 1945 (1945 P-H T. C. Memorandum Decisions, par. 45,106), affirmed, 155 F. 2d 23 (C. A. 2), certiorari denied, 329 U. S. 726; *Robinson* v. *Commissioner*, 69 F. 2d 972 (C. A. 5); *Natwick* v. *Commissioner*, 36 B. T. A. 866; *Wood* v. *Commissioner*, decided November 23, 1943 (1943 P-H T. C. Memorandum Decisions, par. 43,488). Cf. *Dr. Pepper Bottling Co. of Miss.* v. *Commissioner*, 1 T. C. 80, 84.

whereas, in the instant case there was no purpose to reissue the shares, nor were they ever reissued.

CONCLUSION

The decision of the court below is clearly correct, and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

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JUNE 1951.

U. S. GOVERNMENT PRINTING OFFICE: 1951

In The

Supreme Court of the United States

October Term, 1951.

No. 70

Hans F. Bruun, Petitioner,

v.

Commissioner of Internal Revenue, Respondent.

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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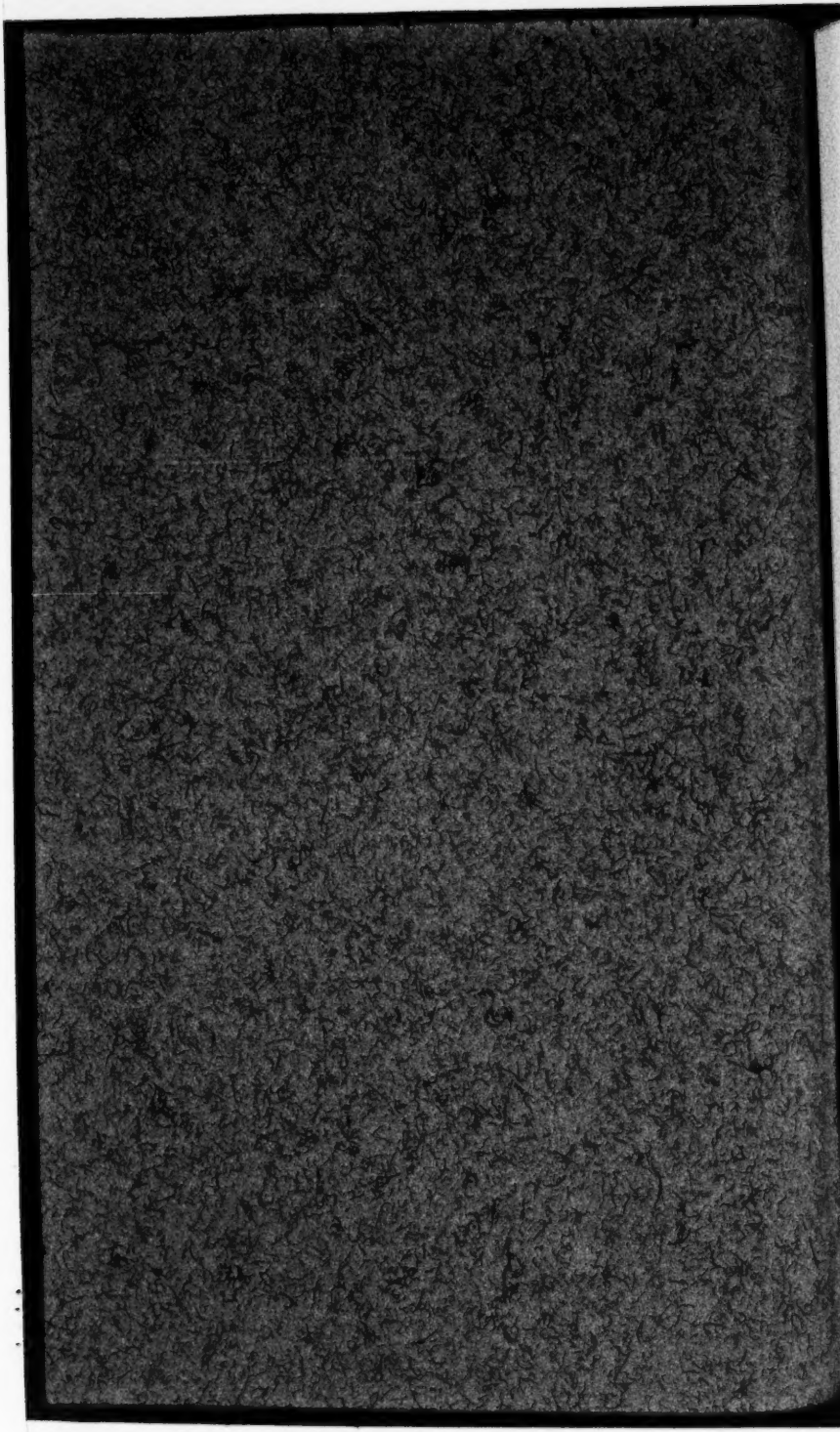

In The

Supreme Court of the United States

October Term, 1951

No. 70

James F. Boyle, *Petitioner,*

v.

Commissioner of Internal Revenue, *Respondent*

SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, on the 24th day of May, 1951, filed with this Honorable Court a petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit and brief in support thereof.

The principal purpose of this supplemental memorandum is to call to the attention of this Honorable Court

the decision of the Tax Court of the United States in *Carter Tiffany* v. *Commissioner of Internal Revenue,* Docket No. 27780, 16 T.C. No. 176, promulgated on June 29, 1951.

Question Presented

On December 13, 1943 the petitioner in the case at bar sold to Air Cruisers, Inc. 3,302 shares of stock in that corporation for $206,936.34. The cost of said stock to petitioner was $10,140. In filing his Federal income tax return for 1943 the petitioner reported the correct profit from the sale, $196,799.34, as capital gain from the sale of a capital asset (common stock in a corporation) and paid the tax thereon at capital gain rates.

The respondent concluded that the transaction involved was not a purchase and sale but rather the distribution of a taxable dividend under Section 115(g) of the Internal Revenue Code and taxed the petitioner on the entire sum of $206,936.34 as ordinary dividend income for 1943, determining a deficiency in tax of $137,561.21.

The Tax Court of the United States held that the 3,302 shares of stock had been "redeemed" by Air Cruisers, Inc. "at such time" and "in such manner" as to make the consideration of $206,936.34 paid for the stock by the corporation essentially equivalent to the distribution of a taxable dividend and affirmed the respondent in determining a deficiency of $137,561.21 in Federal income tax against the petitioner for the year 1943 (R. 14A-27A). The Court of Appeals affirmed the decision of the Tax Court (R. 35-43).

The petition accordingly presented the question whether the transaction involved constituted a sale by petitioner of 3,302 shares of stock in Air Cruisers, Inc. or the distribution of a taxable dividend by Air Cruisers, Inc. to petitioner in the amount of the consideration paid for the stock, $206,936.34.

Since the filing of the petition for a writ of certiorari herein, the Tax Court of the United States decided on June 29, 1951 the case of *Carter Tiffany* v. *Commissioner of Internal Revenue, supra,* Docket No. 27780, 16 T.C. No. 176.

Carter Tiffany and the petitioner herein were the two stockholders in Air Cruisers, Inc. who on the same date, December 13, 1943, sold stock to Air Cruisers, Inc. In the case at bar (*Boyle* v. *Commissioner*) the Court of Appeals summarized the following facts found by the Tax Court (R. 37-38):

* * * *

> On that same date petitioner and Tiffany endorsed to the company 3,302 and 3,202 shares for which they received $206,936.34 and $200,669.34 respectively. The 6,504 shares were held by the company as treasury stock until its dissolution. Taxpayer retained 300 shares and continued as president because Gerrish, who expected to function as executor of Glover's Estate, believed his technical knowledge was required for the company to complete work under its contracts. Tiffany gave Gerrish a ten year option to purchase 300 shares at ten cents each with a proxy and power of attorney to vote the stock during the option period. The option was exercised in 1944. Tiffany considered the 300 shares compensation to Gerrish for services in disposing of his stock to the company. Gerrish said he thought they were a gratuity from Tiffany.

* * * *

In its decision in *Carter Tiffany* v. *Commissioner, supra,* the Tax Court recognized the sale by Tiffany of 3,202 shares of stock to Air Cruisers, Inc. and held that Tiffany was entitled to report the profit as capital gain and that the sale price, $200,669.34, was *not* taxable to Tiffany as a dividend under Section 115(g) of the Internal Revenue Code.

Therefore it is respectfully submitted that in the matter of two stockholders who sold an almost identical amount of stock on the same day, the Tax Court has reached conclusions which are not only inconsistent but are diametrically opposed, contrary and repugnant. The Tax Court has refused to recognize the sale by Mr. Boyle and has approved a deficiency in tax of $137,561.21 on the theory that he received a dividend whereas the Court has recognized the sale by Mr. Tiffany and has refused to approve the deficiency in tax proposed against him by the Commissioner of Internal Revenue.

We think that this presents a very novel situation and a curious, conflicting and inconsistent interpretation of Section 115(g) of the Internal Revenue Code which should be cured and set at rest by a decision of this Honorable Court.

A copy of the Findings of Fact and Opinion of the Tax Court in *Carter Tiffany* v. *Commissioner of Internal Revenue,* supra, is attached hereto as an appendix to this memorandum.

Furthermore it is respectfully submitted that the decision of the Tax Court strengthens and confirms Point III, page 18, of petitioner's brief in support of petition for certiorari, to wit:

"On December 1, 1943, the stockholdings of Air Cruisers, Inc. were as follows: (R. p. 16A)

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	3,602 shares
Carter Tiffany	3,502 shares
H. P. Morris	100 shares

"Immediately after the sales by Boyle and Tiffany on December 13, 1943, the stockholdings of Air Cruisers, Inc. were as follows (R. p. 16A):

Estate of Earl F. Glover	3,501 shares
James F. Boyle (Petitioner)	300 shares
Carter Tiffany (holding of record)	300 shares
H. Preston Morris	100 shares"

The Estate of Glover did not sell its 3,501 shares of stock and received no payment of any kind. H. P. Morris received no payment.

Under the decision of the Tax Court in *Tiffany* v. *Commissioner,* supra, Mr. Tiffany made a sale but did not receive a dividend.

Under the decisions of the Tax Court, only Boyle, of all the stockhoders, received a dividend. Since the other stockholders did not receive a dividend under the facts as found by the Tax Court the payment to Boyle loses all resemblance to a distribution made "at such time" or "in such manner" as to be "essentially" equivalent to a taxable dividend under Section 115(g) of the Code. There was clearly under the Tax Court's decisions no pro rata payment to all stockholders owning stock of the same class or any payment that even bore a remote resemblance to a dividend in 1943.

The Tax Court attempts to distinguish its decision in *Tiffany* v. *Commissioner,* supra, from its decision in *Boyle* v. *Commissioner,* supra (this case) on the ground that in 1945 Boyle regained the same proportional interest in the corporation that he had in 1943. The fact remains, however, that at the close of the year 1943 and during 1944, Boyle's holdings had lessened by 3,302 shares and he had lost control.

The tax here involved was assessed for the year 1943, on conditions as they existed in 1943, and we respectfully submit that this case should be decided on the basis of the facts as they were at the close of 1943 and not on the basis of what happened in 1945 by reason of

the sale of the 3,501 shares of stock by the Glover Estate in 1945.

Conclusion

It is respectfully submitted that the decision of the Circuit Court of Appeals in this case is incorrect in affirming the Tax Court and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

THE TAX COURT OF THE UNITED STATES

Carter Tiffany, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Docket No. 27780. Promulgated June 29, 1951.

Payment received by petitioner from corporation in exchange for stock therein in circumstances whereby he no longer retained any beneficial stock interest in the corporation, *held* not a taxable dividend under section 115 (g), Internal Revenue Code. *James F. Boyle,* 14 T. C. 1382, distinguished.

Randolph Paul, Esq., Meyer Kurz, Esq., and *Howard Rea, Esq.,* for the petitioner.

John J. Madden, Esq., for the respondent.

The respondent determined a deficiency in income and victory taxes in the amount of $126,223.63 for the calendar year 1943. The only issue now in dispute is whether $200,669.34 received by petitioner for 3,202 shares of stock of Air Cruisers, Inc., is taxable as a dividend under section 115 (g) of the Internal Revenue Code.

Findings of Fact.

A stipulation of facts filed by the parties is adopted as part of our findings.

Petitioner, an individual residing in Englewood, New Jersey, filed his income and victory tax return for 1943 with the collector of internal revenue for the third district of New York.

In 1929 petitione rbecame associated with Anthony H. Fokker, an airplane designer, inventor, and manufacturer, and remained with Fokker until Fokker's death in 1939, when he became sole executor under Fokker's will.

Air Cruisers, Inc., referred to sometimes hereinafter as the company, was a corporation engaged in manufacturing and selling airplane safety equipment. It was organized under the laws of Delaware in 1929 with an authorized capital stock of 10,000 shares, which was increased during the same year to 15,000 shares, but no more than 10,705 shares were ever issued and outstanding. In 1931 and for some years thereafter the financial condition of the company was exceedingly precarious. Petitioner, at the suggestion of Fokker, purchased 5,600 shares of Air Cruisers stock for one dollar in 1931. He became a vice president and director in 1932.

Prior to his death in July 1943, Earl F. Glover was the business manager and financial head of the company, serving as president and treasurer. James F. Boyle was secretary and chief engineer; he became president after Glover's death. Thomas P. Vaughan succeeded Glover as treasurer.

During the early days, Glover and Boyle received small salaries. Petitioner received no salary until 1941; he had various other interests both before and after 1941, and his services to the company were not on a full-time basis. In August 1939, petitioner transferred as a gift 2,150 shares of Air Cruisers stock to Glover and 448 shares to Boyle. These gifts made the stockholdings of petitioner, Boyle and Glover approximately equal. Beginning with the period immediately prior to May 11, 1943, the stockholders of record of Air Cruisers were, on the dates and for the periods indicated, as follows:

tockholder	Prior to 5/11/43	5/11/43 to 12/13/43	12/13/43 to 12/18/43	12/18/43 to 5/16/44	5/16/44 to 5/18/45	5/18/45 to 5/29/45	Afte 5/29/
F. Boyle	3,095	3,602	300	300	300	300	30
r	2,995	3,501	3,501	3,501	3,501	------	------
oner	2,995	3,502	300	300	------	------	------
Morris	100	100	100	------	------	------	------
m Bissell	710	------	------	------	------	------	------
n Van Muffling	810	------	------	------	------	------	------
ury Stock	------	------	6,504	6,504	6,504	10,005	9,80
han	------	------	------	50	200	200	30
y A. Gerrish	------	------	------	50	200	200	30
Total	10,705	10,705	10,705	10,705	10,705	10,705	10,70

The foregoing table is based upon the records of the company, and is not necessarily accurate as to beneficial ownership of the stock for the periods involved.

The 2,995 shares owned by petitioner immediately prior to May 11, 1943, were part of the shares originally acquired by him in 1931. On May 11, 1943, petitioner purchased 507 shares, Glover 506 shares, and Boyle 507 shares of the total of 1,520 shares owned by Pelham St. George Bissell and Adrian Van Muffling. Petitioner paid $20 a share, or a total of $10,140 for his 507 shares.

The company's gross sales rose from practically zero in 1939 to about $10,000,000 in 1942 and 1943, and were about $7,000,000 in 1944. During these latter years over 95 per cent of its sales were to the United States Government. The company was indebted to the Fokker estate on a note in the amount of $107,316.56. The parties appear to be of the impression that no dividends could be paid while the note was outstanding. However, no such prohibition appears on the face of the note. By the end of 1942, the company was in a strong financial position, and the note could easily have been paid at that time. Moreover, by its terms, the note could have been discharged by the issuance of preferred stock, but petitioner opposed the issuance of preferred stock as adverse to the interests of the estate, and Glover and Boyle had told petitioner that they would not cause the note to be paid off in preferred stock over his objections.

WRITING CLOSE TO EDGE

Petitioner's relationships with the other officers and directors of the company were generally cordial from 1931 to 1940, but beginning in 1940 friction developed, particularly between Glover and petitioner. A disagreement also arose in 1943 between Boyle and petitioner, after Glover's death, that resulted in strained relations.

Notwithstanding the company's prosperity during the war, it had never declared or paid any dividends, nor had it taken any steps to discharge the Fokker note, which may have been regarded as an obstacle to the payment of dividends. During 1943, a salary of $62,500 was paid to Glover or to his estate, $62,500 to Boyle, $20,000 to petitioner, and $15,083.31 to Vaughan.

In the spring of 1943 the company's war contracts were renegotiated, and during 1943 it paid a renegotiation liability of $1,700,000 for 1942. Subsequent thereto, the prices charged by the company were scaled downward, and the possibility of renegotiation for subsequent periods was considerably diminished. The company's December 31, 1943, balance sheet made no provision for any renegotiation liability for 1943, and renegotiation proceedings for the year 1943 in fact resulted in a determination of no liability. The company's cash on hand as of December 31, 1943, after the purchases of stock from petitioner and Boyle on December 13, 1943, hereinafter described, was $476,294.05. The surplus shown on the company's books as of December 31, 1943, was $629,317.24.

Glover's will appointed Harry A. Gerrish, the company's attorney, as executor. Caveats protesting probate of the will were filed by Glover's divorced wife and son on August 6, 1943, and September 7, 1943, respectively. On March 30, 1944, the Passaic County Surrogate's Court, New Jersey, dismissed the caveats and authorized Gerrish to administer the estate. No temporary administrator was appointed prior to March 30, 1944.

Petitioner was dissatisfied with the company's failure to pay dividends. In addition, as a result of strained personal relations, and possibly for other reasons as well, petitioner was anxious to dispose of his stock in the company.

At a meeting with Glover and Boyle some time prior to the fall of 1942 at which there was violent disagreement between Glover, Boyle and petitioner, petitioner offered to sell all his stock to Glover and Boyle for $75,000. They did not accept his offer. Late in 1942 or early in 1943, petitioner offered his stock to Gerrish and Clyde D. Yeomans, the company auditor, but the offer was not accepted.

In 1942 and 1943, petitioner participated in various negotiations looking towards the sale of all of his stock as well as Glover's and Boyle's stock to outside interests. After Glover's death in July 1943, petitioner held conferences with a Colonel Davis regarding a possible sale of petitioner's and of Boyle's stock to the Pharis Tire and Rubber Company. Gerrish had not yet qualified as executor of Glover's will as a result of the litigation which delayed probate of the will. Boyle agreed orally to the Pharis sale, but withdrew at the last moment when the contract was to be signed. Since Pharis was interested in acquiring at least a majority of the outstanding stock, the entire deal collapsed. Petitioner was incensed at Boyle because of Boyle's refusal to adhere to his oral commitment. Petitioner was so angry that he refused to see Boyle again, stayed away from the factory, and threatened Boyle with lawsuits.

Thomas P. Vaughan had been an employee of the company since 1931. He became assistant treasurer and assistant secretary in 1941. He first became a stockholder in the company on December 18, 1943, when he and Gerrish each purchased 50 shares of the 100 shares owned by H. P. Morris.

Late in November 1943, Gerrish visited petitioner in his New York office and proposed a sale of petitioner's stock to the company itself at book value. Petitioner assented. On December 1, 1943, at a subsequent meeting between Gerrish and petitioner, Gerrish requested petitioner to turn over to him 300 shares in connection with the transaction. Petitioner agreed to do so. However, at Gerrish's request, the transfer of the 300 shares was not made to Gerrish outright. Instead, petitioner, on December 1, 1943, signed an option agreement, conferring on Gerrish the right to purchase 300 shares of the company's stock at 10 cents a share at any time prior to 1954. The option agreement recited that petitioner would deposit the 300 shares with one Otto Cooper [an associate of Gerrish], as trustee, and petitioner in fact endorsed a certificate for 300 shares in blank on December 1, 1943, and simultaneously delivered it to Gerrish. Petitioner also conferred on Gerrish the irrevocable right to vote the stock, and simultaneously executed a document, appointing Gerrish as his proxy from December 1, 1943, until January 1, 1954. Gerrish took the documents to his office and put them in the safe of Otto Cooper, whom petitioner had never met. Petitioner never saw the documents again.

The book value of the stock on December 1, 1943, was $62.67 per share. It was understood between petitioner and Gerrish that the consideration of 10 cents a share mentioned in the option agreement would not be paid, and in fact it was never paid, nor was any other consideration paid in connection with the option agreement. Beginning with December 1, 1943, Gerrish considered himself as having supplanted petitioner as the owner of the 300 shares.

At some time on or before December 1, 1943, petitioner learned that the company's purchase of his shares at

book value was to be accompanied by a similar purchase at the same price of stock owned by Boyle.

On December 13, 1943, the directors and shareholders of the company, at special meetings held for the purpose, agreed to accept the offers of petitioner and Boyle to surrender to the company 3,202 shares and 3,302 shares, respectively, of the stock of the company for the respective amounts of $200,669.34 and $206,936.34. On the same day, petitioner and Boyle each delivered to the company certificates representing the number of shares ascribed to him above.

The shares acquired by the company from petitioner and Boyle were not cancelled but were held by the company as treasury stock and were carried on its books as assets in an investment account with no reduction of or charge to surplus therefor. The balance sheets set forth on the income tax return filed by the company for 1943, 1944, and 1945 indicate that a charge to surplus was made in connection with the transfer of the shares of petitioner and Boyle to the company.

After his transfer of 3,302 shares to the company on December 13, 1943, Boyle continued to hold 300 shares of stock of the company. He also continued to play an active role in the management of the company as president and director. For the year 1944 Boyle received $45,000 as salary or compensation for services rendered.

After December 1, 1943, petitioner had no beneficial interest in the 300 shares delivered to Gerrish. After his transfer of 3,202 shares to the company on December 13, 1943, he had no further beneficial stock interest in the company.

The directors' meeting of December 13, 1943, was attended by Boyle, Vaughan, Gerrish and petitioner. Boyle was elected president and secretary of the company to

succeed Glover. Vaughan was elected vice president and treasurer. Petitioner was elected a vice president to serve until the next annual meeting and accepted the office. Petitioner had stated that he would like to be elected vice president and director so that he would be in a position to discharge his duties to the Fokker estate. However, he was reminded that his salary would stop at the end of 1943, and petitioner acquiesced. Petitioner did not in fact serve after December 13, 1943, and was not thereafter reelected at the directors' and stockholders' meetings in March 1944.

Gerrish assumed and performed the duties of vice president and director formerly performed by petitioner shortly after December 1943. He was formally elected vice president on March 30, 1944, receiving compensation retroactively to January 1, 1944, at $20,000 a year. Petitioner's annual salary of $20,000 terminated in December 1943, and he received no salary for 1944 from the company.

On December 29, 1943, petitioner received payment in the amount of $200,669.34 for the stock which he sold to the company. In 1944 he received a check representing a small balance of his 1943 salary. After December 13, 1943, he never received any payments, other than the foregoing, from the company.

After December 13, 1943, petitioner did no further work for the company. He had no further association or contact with the stockholders and officers of the company, except for communications with Gerrish regarding payments of principal and interest on the Fokker note, and was never consulted by the stockholders or officers in any capacity. Petitioner never saw the officers or stockholders again until he was called as a witness in the case involving Boyle's tax liability for 1943, except for a brief chance encounter in 1947. Petitioner never

visited the company's plant again except for a five-minute visit on December 29, 1943, to collect the check for the purchase of his stock. Petitioner regularly attended all meetings of the directors and shareholders of the company until December 13, 1943. After December 13, 1943, he never received notice of or attended any directors' or shareholders' meeting of the company.

Gerrish was in a position at any time after December 13, 1943, to record or to have recorded on the stock book of the company the transfer of the certificate for 300 shares to himself or anyone else. On May 16, 1944, Gerrish did fill in the blank on the back of the certificate with his name and the name of Vaughan, recorded the transfer on the stock book of the company, and caused two certificates for 150 shares each to be issued in lieu thereof to himself and Vaughan. Vaughan paid nothing to Gerrish for these 150 shares. Petitioner never received any notice that the option of December 1, 1943, had been exercised and that Gerrish had transferred the 300 shares to himself and Vaughan; he never expected to receive any such notice.

On May 17, 1945, at meetings of the company's board of directors and stockholders, it was determined to offer to purchase the 3,501 shares held by the Glover estate for $62.67 per share. The book value of the stock was considerably higher at that time. The residuary legatees were granted an option to repurchase any portion of the stock so acquired by the company, to the extent of their respective legacies for $62.67 per share, provided that the option were exercised on or before June 1, 1945. Vaughan and Gerrish were among the residuary legatees, and shared to the extent of one-sixth each. They were the only residuary legatees to exercise the option, and although each could have repurchased over 500 shares, each in fact repurchased 100 shares. As a result, Boyle,

Vaughan, and Gerrish thereafter owned 300 shares each, and no other shares were outstanding, apart from the repurchased shares being held as treasury stock.

Petitioner did not learn until 1947 that there had been a sale of the stock of the Glover estate. Whatever may have been the plans of Boyle, Gerrish, and Vaughan, petitioner's sole purpose in selling his stock to the company was to part with all his interest in the company.

During 1943 and prior years petitioner had activities outside of the company and other sources of income. He handled various matters for Fokker until Fokker's death in 1939. He was a partner in the brokerage house of Gamwell & Company from 1941 to 1945, although he was relatively inactive in that concern in 1943. He received substantial receivership fees in 1943. Air Cruisers, Inc., furnished practically the sole activity for Boyle and Glover.

None of the sales of stock to the company was based upon any purpose to decrease any of the company's activities. The company remained in business and was later dissolved in 1949.

The transfer of shares owned by petitioner and transferred to Air Cruisers, Inc., constituted an outright purchase by the company and a sale by petitioner. The payment of $200,669.34 to petitioner in December 1943 was not made at such time and in such manner as to be a dividend or essentially equivalent to a taxable dividend.

Opinion

RAUM, *Judge:* In *James F. Boyle,* 14 T. C. 1382, affd. (C. A. 3), 187 F. 2d 557, we held that Boyle's proceeds from the December 13, 1943, sale of stock to the company constituted a taxable dividend to him under section 115

(g) of the Internal Revenue Code.[1] We gave weight to the fact that at the inception of the transaction there were three principal stockholders, and that upon completion of the various steps (including the disposition of the stock of the Glover estate), three principal stockholders remained holding their shares in virtually equal proportions.

Thus, when all the smoke cleared away, Boyle emerged with a substantially identical fractional interest in the corporation. We noted that the transaction had "too many appearances of being interrelated parts of a single operation to discard the suggested test of the *Flanagan* case [*Helvering* v. *Flanagan* (C. A. D. C.), 116 F. 2d 937, 939] as to the 'net effects of the distribution.'" As to Boyle, the December 1943, payment constituted in practical effect nothing more than a distribution of corporate profits to one whose ultimate fractional stock interest in a going concern was not substantially altered.

Respondent contends that the same result is required here, placing great stress upon the fact that petitioner similarly retained 300 shares (the same number of shares retained by Boyle), and that it was not until some months later, in May 1944, that petitioner ceased being a stockholder of record. We think there is a crucial difference between this case and the *Boyle* case.

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[1] SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

* * * *

(g) REDEMPTION OF STOCK.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

We are satisfied that petitioner did not retain any beneficial interest whatever in any stock of the company after December 13, 1943. Although it is true that he remained a stockholder of record, to the extent of 300 shares, until May 16, 1944, the fact is that he delivered those shares, endorsed in blank, to Gerrish on December 1, 1943, accompanied by an irrevocable proxy entitling Gerrish to vote the stock. There was never any intention that the formalities described in the option agreement would ever be carried out; it was the understanding of both petitioner and Gerrish that by the transfer of December 1, 1943, petitioner parted permanently with all interest in the 300 shares at that time. Thus, after the sale of December 13, 1943, petitioner no longer retained any beneficial stock interest whatever. His situation was wholly different from Boyle's. He sold all of his stock. The transaction was not the equivalent of the distribution of a taxable dividend as to him. We conclude that, on the facts of this case, section 115 (g) has no application to petitioner.

Decision will be entered under Rule 50.